IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-2[illegible]
No. 73-2066

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Petitioner

DELTA MINING INC., *et al.*, *Respondents*

NATIONAL INDEPENDENT COAL
OPERATOR'S ASSOCIATION, *et al.*, *Petitioners*

v.

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR, *et al.*, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit and the District of Columbia Circuit

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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IN THE

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ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

The Bituminous Coal Operators' Association, Inc., respectfully files this brief *amicus curiae,* with the writ-

ten consent of all parties (Appendix 1a-1c), pursuant to Rule 42 of the Rules of the Supreme Court.

I

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION

The Bituminous Coal Operators' Association, Inc. (hereinafter referred to as BCOA) is a voluntary nonprofit association of bituminous coal mine operators. It was established in 1952 out of an effort to bring a degree of stability to the labor-management relations chaos and the long and bitter strikes that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA also is the principal coal industry spokesman on matters involving health and safety under the Federal Coal Mine Health and Safety Act of 1969.

BCOA membership is open to any bituminous coal company that is signatory to the National Bituminous Coal Wage Agreement. Its membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA, therefore, has a continuing interest in the implementation and enforcement of the Federal Coal Mine Health and Safety Act of 1969, which is applicable to the mining operations of each of its members.

II

STATEMENT OF THE CASE

This brief, in support of Respondents at No. 74-521 and Petitioner at No. 73-2066, is addressed to the central issue in these cases—whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary may issue final orders assessing civil penalties against mine operators in amounts up to $10,000 per violation, without making factual findings which reflect a determination of operator liability and a considered application of the six statutory penalty criteria of Section 109(a)(1).

A. The Statutory Scheme

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act") establishes, under Titles II andd III, comprehensive interim standards for the health and safety of the 140,000 miners employed in the more than 2000 underground and surface bituminous and anthracite coal mines and empowers the Secretary of the Interior, under Title I, to promulgate new and improved health and safety standards.

Title I also establishes a number of detailed procedures, often applied cumulatively, for the enforcement of such standards by the Department of the Interior, which include:

1. *Ex parte* issuance, by a federal mine inspector, of "such orders as he deems appropriate to insure the safety of any person in the coal mine," in the event of "any accident occurring in a coal mine." Section 103(f), 30 U.S.C. 813(f). There is no provision for review of such orders under the Act's general administrative review provision. Section 105(a), 30 U.S.C. 815(a);

2. *Ex parte* issuance, by a federal mine inspector, of mine closure orders requiring the immediate withdrawal of coal miners from all or part of the mine in which the inspector finds the existence of an "imminent danger." Section 104(a), 30 U.S.C. 814(a).[1] Such orders are administratively reviewable and may be vacated, affirmed, modified or terminated, but cannot be stayed by the Secretary pending such appeal and review. Section 105(a), (b) and (d), 30 U.S.C. 815(a), (b) and (d);

3. *Ex parte* issuance, by a federal mine inspector, of mine closure orders in the event a coal mine operator fails to abate a claimed violation, whether serious or non-serious, within the time unilaterally fixed by the federal mine inspector for its abatement. Section 104(b), 30 U.S.C. 814(b). Both the order and the reasonableness of the abatement period are reviewable administratively under Section 105;

4. *Ex parte* issuance, by a federal mine inpector, of mine closure orders in the event he finds a violation of a mandatory standard and also finds it "to be caused by an unwarrantable failure of such operator to comply" with health or safety standards. Section 104(c), 30 U.S.C. 814(c). Such orders are similarly reviewable under Section 105;

5. The imposition by the Secretary of a mandatory civil penalty not to exceed $10,000 for each violation of the Act or a health or safety standard, whether serious or non-serious. Section 109(a), 30 U.S.C. 819 (a);

[1] The term "imminent danger" is defined as "the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Section 3(j), 30 U.S.C. 802(j).

6. Criminal sanctions. Section 109(b)-(e), 30 U.S.C. 819(b)-(e);

7. The payment by the operator of compensation to miners idled by a mine closure order. Section 110 (a), 30 U.S.C. 820(a).

Each year federal mine inspectors issue approximately 5,000 mine closure orders and cite mine operators for approximately 80,000 violations,[2] most being technical and non-serious.

B. The Statutory Procedure for Assessment of Civil Penalties

Section 109(a)(1) provides for the mandatory imposition of civil penalties in amounts up to $10,000 for each violation of the Act or a health or safety standard, whether serious or non-serious. In determining the amount of each penalty, the Secretary is required to consider six criteria: (1) the mine operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) his ability to continue in business, (5) the gravity of the violation and (6) the operator's demonstrated good faith in attempting to abate the violation.

Section 109(a)(3) provides that each penalty "shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . . ."

[2] Page 29 of Petitioner's brief at No. 74-251.

If the penalty as assessed by the Secretary is not paid, Section 109(a)(14) authorizes the commencement of an enforcement proceeding by the Secretary in an appropriate district court. All issues, except those which were or could have been raised in judicial review proceedings under Section 106, are to be determined *de novo* and the Court is empowered to enforce, modify, set aside or remand the order. The operator has the right to have disputed factual issues submitted to a jury, but the amount of the penalty is to be fixed by the Court.

C. The Secretary's Procedures for Assessment of Civil Penalties

The Secretary's implementation of the civil penalty provisions of the Act has been marked by vacillation, confusion, uncertainty and continual procedural changes. Since March 30, 1970, when the Act became effective, four different procedures have been employed and even those were subject to constant revision:

1. *March, 1970-January 1971*

The Secretary's initial procedure, promulgated on March 28, 1970 (35 F.R. 5257), established a schedule of fixed penalties of $25, $100 and $500 for each violation depending on seriousness, with increased amounts for second, third and additional violations during any 12 month period. The amounts of the penalty for first violations during the initial six-month period of enforcement were reduced on May 7, 1970 (35 F.R. 7181).

If the scheduled amount was not paid within 30 days after the violation was detected, a formal administrative proceeding automatically was initiated by the Bureau of Mines and the case assigned to a Department Hearing Officer.

On April 30, 1970, a three-judge federal Court in the Western District of Virginia temporarily restrained the use of the penalty schedule, but otherwise permitted the assessment procedures to remain in effect.[3] As a result, formal administrative proceedings for the assessment of penalties by Department Hearing Officers were automatically initiated for each violation cited.

On November 18, 1970, the Secretary rescinded the penalty schedule and officially continued the formal hearing procedure which had been in effect since issuance of the restraining order.

2. *January, 1971-April, 1973*

On January 16, 1971, the Secretary established a new penalty assessment procedure, Part 100, 30 C.F.R., whose validity is at issue in these cases. The Part 100 regulations provided for the issuance of a proposed penalty order by a Bureau of Mines Assessment Officer. Sections 100.4(a) and 100.2(a). If the operator failed to protest the proposed order (or revised proposed order) within 15 days, he was deemed to have waived his right to a hearing and the proposed order became the Secretary's final order. Section 100.4(e).

In practice, the Bureau's Assessment Officer took the Bureau mine inspector's notice of violation as establishing a violation and made no independent determination of the fact of violation. Preprinted assessment orders, containing a "boiler plate" statement that the penalty was determined after consideration of the six statutory criteria, were utilized by the government assessment officers. However, the courts below found that

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[3] *Ratliff* v. *Hickel*, Civil Action No. 70-C-50-A.

the penalties were determined by mechanical reference to a fixed schedule, that the individual circumstances of each case were not considered, and that no findings or other records which would reflect the basis for the proposed penalty were made or retained. No additional determinations or findings of liability or the appropriateness of the penalty were made when the proposed order became the Secretary's final order.

Penalty assessment data in the record of the *NICOA* case indicates that, during the relevant period, coal mines in Pennsylvania employing from 2 to 700 miners and producing from 30 to 9500 tons per day were assessed virtually identical penalties, ranging from $5,000 to $9,000, per violation deemed to create an imminent danger.[4]

3. *April, 1973-August, 1974*

On April 24, 1973, the Part 100 procedures were suspended by the Secretary (38 F.R. 10085) following issuance of an injunction by the District Court for the District of Columbia in *NICOA* v. *Morton*, 357 F. Supp. 509.

They were replaced with what the Secretary termed "interim regulations" which provided for a formal administrative hearing in each case, with the formal proceedings being initiated automatically by the Bureau of Mines. 38 F.R. 10086-10087. The Bureau's Petition for Assessment was accompanied by a "tentative recommended penalty" which could be paid, thereby ter-

[4] This contrasts with the unsupported data referred to at page 33, fn. 44 of the Government's Brief in No. 74-521 which would tend to indicate that most civil penalties assessed under Section 109 were in amounts less than $50.00.

minating the proceeding. The mine operator's failure to make timely answer to the Bureau's petition was deemed to constitute a waiver of his right to a hearing; but the administrative law judge nevertheless was required to make factual findings as to the appropriateness of the penalty to be assessed, based on evidence introduced at an *ex parte* hearing or information supplied informally by the Bureau. 43 C.F.R. 4.544 (1973).

These "interim" regulations, which remained in effect for approximately sixteen months, were essentially identical to the formal hearing procedures in effect from April 30, 1970 to January 16, 1971.

4. *August, 1974-present*

Yet another procedure for the assessment of civil penalties under Section 109, the fourth major change in little more than four years, was initiated by the Secretary on August 1, 1974. 39 F.R. 27558. This procedure, which is currently in effect, reestablishes the use of pre-hearing penalty orders issued by assessment officers and default procedures whereby the assessment officer's order becomes the Secretary's "final order" if the mine operator fails to request a hearing. Section 100.4(c).

D. The Court of Appeals Decision in NICOA

In *NICOA* (No. 73-2066), the Court of Appeals for the District of Columbia, reversing the judgment of the District Court, construed the Act to require the Secretary to support a penalty assessment order with findings only in the event an administrative hearing is conducted. Specifically, the Court held,

> "Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the

> Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order."

The District Court had found that the proposed assessment orders contained no information as to the basis for the penalty.

E. The Court of Appeals Decision in Delta Mining

In *Delta Mining* (No. 74-251), the Court of Appeals for the Third Circuit, in a number of District Court actions brought by the Secretary under Section 109(a)(4) to collect civil penalties, expressly rejected the reasoning of the Court of Appeals in *NICOA*. It found the provisions of Section 109(a)(3) unambiguous and requiring "every final assessment order of the Secretary to be accompanied by findings of fact." While sympathizing with the Secretary's concern that a requirement of findings for each of the 80,000 violations detected annually might "hobble" effective enforcement of the Act, the Court noted that just the opposite effect could result:

> "Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings."

III

ARGUMENT

Section 109(a)(3) requires that each penalty order issued by the Secretary be accompanied by factual findings which reflect a determination of operator liability and a considered application of the six statutory penalty criteria of Section 109(a)(1).

From the outset, the efforts of the Secretary to implement the Federal Coal Mine Health and Safety Act of 1969 and the efforts of the coal industry to achieve and maintain high levels of safety have been encumbered by a common obstacle—the staggering number of violations cited by the Secretary under Section 104 of the Act.

The Secretary of Interior has chosen to construe the Act as requiring a citation and a penalty in every case regardless of how insignificant or non-serious the "violation." This is in contrast to OSHA, which specifically authorizes issuance of warning notices in many instances where citations of violations would issue under the Coal Mine Act.

The coal mine violations, cited at the rate of 80,000 a year, encompass a wide spectrum of statutory and regulatory measures, ranging from purely administrative requirements (e.g. use of sign designating mine office, Section 107(a)), to "non-serious" standards (e.g. drinking water to be supplied underground, Section 317(s)), to "serious" safety standards (e.g. periodic examinations for explosive gases, Section 303(h)). They occur in the constantly changing working environment of surface and underground coal mines, employing from one to 500 miners and producing from 20 to 10,000 tons a day.

The litigation presently before the Court resulted from an attempt of the Secretary to minimize the need for formal administrative hearings to assess penalties by the use of default procedures and from an attempt of the Bureau's Assessment Officers to avoid the administrative burden of making genuine determinations of operator liability and of an appropriate penalty. This was to be accomplished by the mechanical use of a penalty schedule with fixed dollar amounts.

It is the position of BCOA that the Secretary's penalty assessment procedures in Part 100, as written and as implemented by the Bureau's Assessment Officers, are contrary to the plain mandate of Section 109(a)(1) and (3).

A. Sections 109(a)(1) and (a)(3) Are in pari materia

The contention of the Secretary throughout has been that factual findings are not required under Section 109(a)(3) when the operator forgoes or "waives" his right to an administrative hearing. To state the issue in these terms is to confuse it, for the contention ignores the equally plain mandate of 109(a)(1) that all penalties be determined after a full consideration of the six statutory criteria.

The nature and extent of the Secretary's duty in assessing a civil penalty cannot be determined from the provisions of Section 109(a)(3) alone, but must be derived from a reading of that section in combination with 109(a)(1). The former speaks only to the form and timing of the penalty assessment order—that it contain findings which reflect a determination of operator liability and the appropriateness of the amount of the penalty and that it issue only after the operator

is afforded the opportunity for a hearing. The latter, Section 109(a)(1), requires that each penalty be determined individually after a consideration of the six statutory factors and reflects a clear congressional purpose of insuring that the amount of the monetary penalty be appropriate under all the circumstances of the case.[5] It is this Section 109(a)(1) obligation that was flagrantly ignored by the Secretary's delegates in carrying out their responsibilities under Part 100 and under the Act. The record in each case now before the Court clearly reflects that the Bureau's assessment officers not only made no determination of liability, but gave no consideration to the six factors in determining the amounts of the proposed penalties which ultimately became the final orders of the Secretary. Indeed, that was the finding of the District Court and we do not understand the Secretary to challenge those findings.[6] Thus, penalties were assessed without regard to the liability of the operator, the size of the business, the negligence of the operator or any other of the criteria designed to insure that the amount of the penalty is appropriate under all the circumstances of the particular case. In this regard, the assessment officers ignored the clear mandate of the Act.

The error of the Court of Appeals in *NICOA* apparently stemmed from the Court's assumption that

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[5] Substantially identical criteria govern the assessment of penalties under the Occupational Safety and Health Act of 1970. Section 17(i).

[6] Appellate counsel's efforts (at pp. 34 and 32, fn. 43 of Secretary's brief in *Delta Mining*) to supply the *ratio decidendi*, where the record of the Secretary is silent, clearly is improper. *Federal Power Commission* v. *Texaco, Inc.*, —— U.S. ——, 94 S. Ct. 2315 (1974); *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

the preprinted "proposed" order which ultimately became the "final" order was in fact the product of a considered application of the 109(a)(1) criteria. The Court stated:

> "Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision *which merely would consist of the same information already contained in the proposed assessment order.*" (Underscoring added).

The Court's assumption was misplaced, of course, in view of the District Court's findings (fully supported by the record) as to the lack of any such consideration, in the so-called "formal decision," of the penalty criteria and the absence of any articulation of the manner in which these criteria were applied.[7]

Reading the provisions of Sections 109(a)(1) and (a)(3) together, as we think we must, the contention of the Secretary that the mine operator waives his right to factual findings when he gives up the right to a formal hearing is clearly revealed as mistaken. The failure of the operator to request a hearing under 109(a)(3) has no effect whatever on the obligation of the Secretary to determine an appropriate penalty in the first instance under 109(a)(1) using the six statutory criteria. The 109(a)(1) requirement of factual finding and the 109(a)(3) requirement of an opportunity for

[7] Recent decisions of the Court of Appeals for the District of Columbia faulting agency failure to articulate reasons for administrative actions make it inconceivable that the Court of Appeals would have sanctioned the issuance of a *pro forma* penalty assessment order where factual findings never had been made and absolutely no record existed from which to determine agency reasoning. *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F.2d 925 (C.A. D.C. 1974) and cases cited therein.

a formal hearing are independent requirements. The waiver of one cannot be taken as a waiver of the other.

Since the "proposed" penalty assessment orders issued under Part 100 were defective for want of factual findings or administrative record which would reflect a considered application of the criteria of (a)(1), they were incapable of achieving "final" order status for purposes of enforcement under 109(a)(4).

The Secretary nevertheless argues that a requirement of factual findings to support each penalty assessed "merely imposes an unnecessary administrative burden" on the Department (pp. 34 and 29, Petitioner's brief in *Delta Mining*).[8]

Wholly apart from the fact that such reasoning ignores the procedural requisites of 109(a)(1) and 109(a)(3) and raises other serious questions of constitutional proportions,[9] two complete answers immediately are apparent.

First, a showing of an administrative burden cannot operate to relieve the Secretary of statutory requirements.

Second, the administrative burden of coping with the volume of penalty assessments is one which is largely

[8] The Secretary attempts to finesse the legal issue by suggesting that the amounts involved in these cases are *de minimus*. Of course, what is *de minimus* to one operator may spell financial disaster to another, particularly when one considers the cumulative effect of the enforcement measures in general and the penalties in particular.

[9] Cf. *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972):

> "Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the persons whose possessions are about to be taken."

of the Secretary's own making. The large backlog of cases is due in large part to the indecision, bad judgment and vacillation of the Secretary in constantly changing penalty assessment procedures. Moreover, as the Court of Appeals in *Delta Mining* reminded the Secretary, the probability is great that fewer penalties would have been contested had the decision of the Secretary fixing the penalty evinced a genuine consideration of the circumstances and relevant factors bearing on the amount of the penalty. Perhaps even more important, the "burden" of the penalty assessment program could easily be eliminated through a selective enforcement program which concentrates on the more serious violations and reflects concepts of fault.

B. The Trial de novo Rights of 109(a)(4) Do Not Cure Agency Disregard of 109(a)(1) and 109(a)(3) Requirements

In seeking support of his contention that final penalty assessment orders need not be accompanied by findings or even a record from which the bases of his decisions can be gleaned, the Secretary suggests that the *de novo* trial provisions of Section 109(a)(4) somehow cure the Assessment Officer's disregard for the mandates of 109(a)(1) and (3). Thus the Secretary argues:

> "It is hardly apparent that the operator suffers any prejudice by the lack of findings in this situation, and the general rule is that procedural defects at one level are not fatal when *de novo* review is available at another level." Petitioner's Brief, p. 23, in *Delta Mining*.

Carrying this line of reasoning but one step further, the Secretary presumably would next urge this Court to approve a denial of an operator's request for an administrative hearing under 109(a)(3) on the ground that

even this procedural "flaw" would be cured by a trial *de novo* in the district court.

Such a contention must also be rejected for the reason that Section 109(a)(4) does not provide for the traditional trial *de novo*. The Court of Appeals in *Pittsburgh S.S. Co.* v. *Brown*, 171 F.2d 175, relied upon at page 23 of the Secretary's Brief in *Delta Mining*, aptly describes the characteristics of a true *de novo* trial:

> ". . . such a trial contemplates what the term implies, a trial anew of the entire controversy, including the hearing of evidence, as though no previous action had been taken." 171 F.2d at 178.

However, none of those characteristics are present in 109(a)(4) enforcement proceedings in district court. The "record" of the administrative proceeding under Section 109 becomes a part of the record in the district court and the court is empowered to enforce, modify, set aside or remand the administrative penalty order. Moreover, the statute expressly states that the District Courts may not consider and determine factual issues "which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of the Act." The restrictive effect of the statutory provisions has not yet been judicially determined, but it obviously is a limitation of some significance. In short, while its exact parameters have yet to be determined by the courts, Section 109(a)(4) on its face demonstrates that these so-called *de novo* proceedings in the District Court are not so all-encompassing as described by the Secretary, and even if they were this is irrelevant to the issue in the cases.

C. The Default Procedures of the Secretary's Regulations Conflict with the Act

In support of the practice of issuing final penalty orders without determining operator liability, without regard to the several criteria of 109(a)(1) and without appropriate factual findings, the Secretary postulates that "Congress did not intend to modify the general rule that administrative disputes may be effectively resolved, without a hearing or findings of fact, by express settlement or by reasonable default procedures."[10] This innocent-appearing statement, however, fails to make some rather critical distinctions:

1. Insofar as it deals with the question of agency authority to compromise and settle civil penalty cases, it interjects an issue not raised in either case. Indeed, we do not understand any party to challenge this basic authority of the Secretary and BCOA has in the past on several occasions urged him to utilize it more extensively to reduce the huge backlog of penalty assessment cases.

2. "Compromise" and "default" are not synonymous terms, as the Secretary appears to suggest.[11] The former signifies agreement of the parties, while the latter, as pointed out by the Court of Appeals in *Delta Mining,* suggests only a lack of desire or an inability (due, perhaps, to cost, inconvenience or other considerations) to engage in formal litigation. Certainly there is nothing in the Secretary's admitted authority to compromise penalty proceedings from which to infer the authority to ignore the six statutory criteria of 109(a)(1) in a case where formal hearing is waived.

[10] P. 34, Petitioner's brief in *Delta Mining.*

[11] P. 36, Petitioner's brief in *Delta Mining.*

3. Had Congress intended to authorize default procedures prior to the initiation of administrative proceedings, it would have done so in explicit terms as it had done, one year later, in the Occupational Safety and Health Act of 1970. Section 10(a) of that Act expressly provides for the issuance of proposed penalty orders by the Secretary of Labor and for the proposed order to become final upon failure of the employer to contest it within 15 working days. Here, the Secretary attempted to supply by administrative fiat a procedure not sanctioned by Congress in this statute. No one questions that the Secretary need not hold a formal Administrative Procedure Act-type of hearing where the mine operator waives such a hearing. But that does not excuse the Secretary from compliance with the entirely independent statutory requirements that he make findings of fact which reflect a determination of operator liability and a considered application of the six criteria in every case.[12]

[12] Indeed, Rule 55(b)(2) of the Federal Rules of Civil Procedure requires an appropriate hearing, in the event of default, to determine damages and Rule 52 requires factual findings where the damage issue is tried to the court.

IV

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals in *Delta Mining* should be affirmed and the decision of the Court of Appeals in *NICOA* should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

OFFICE OF THE SOLICITOR GENERAL
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February 3, 1975

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Re: National Independent Coal Operator's Association v. Morton, No. 73-2066, October Term, 1974

Morton v. Delta Mining Co., No. 74-251, October Term, 1974

Dear Mr. Farmer:

As requested in your letter of January 30, I hereby consent to your filing a brief amicus curiae in the above-entitled cases on behalf of The Bituminous Coal Operators Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

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February 10, 1975

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Re: *NICOA* v. *Morton*, Supreme Court No. 73-2066, and *Morton* v. *Delta Mining, Inc.*, Supreme Court No. 74-521

Dear Guy:

In response to your recent request, and on behalf of Delta Mining, Inc., and G. M. W. Inc. in the above, I consent to the filing of an *amicus curiae* in the above by the Bituminous Coal Operators Association.

Sincerely,

/s/ FRED BLACKWELL
Fred Blackwell

cc: Robert H. Bork, *Solicitor General*

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Guy Farmer, Esq.
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1120 Connecticut Avenue, N.W.
Suite 850
Washington, D.C. 20036

Re: *NICOA* v. *Morton*
Morton v. *Delta Mining, Inc.*

Dear Guy:

In response to your letter of January 30, 1975 we herewith consent, on behalf of petitioner National Independent Coal Operator's Association in No. 73-2066, and respondent Edward Mears, et al in No. 74-521, to the filing of an *amicus curiae* brief by the Bituminous Coal Operators Association.

With kindest regards,

/s/ JOHN L. KILCULLEN
John Kilcullen

cc: Frederick R. Blackwell, Esq.
Robert H. Bork, Solicitor General